



**A Study on the Provision of "Reasonable Accommodation"  
for the Employment of Persons with Disabilities  
-Trends and Development in EU Countries and the United States -**

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## **◆Background and purpose of the research**

For persons with disabilities to demonstrate their abilities at work, it is necessary to adjust their working conditions to carry out their profession. In order to adjust these conditions, EU countries have made efforts in recent years to provide "reasonable accommodation".

In its "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation", the EU prohibited direct or indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, and clearly declared the principle of equal treatment. Regarding disabilities, the directive provides for "reasonable accommodation" as an exception. This means that employers shall take appropriate measures, to enable persons with disabilities to have access to, participate in, or advance in employment, or undergo training, unless such measures would impose a disproportionate burden on the employers. This directive also stipulates that member states may introduce or maintain provisions which are more favourable to protection of the principle of equal treatment, and requires member states to take any necessary domestic measures to guarantee the results imposed by this directive no later than December 2006.

In December 2006, the UN Convention on the Rights of Persons with Disabilities was adopted, and the Convention and its Optional Protocol were opened for signature and ratification on March 30, 2007. This convention not only prohibits discrimination on the basis of disability, but also includes a provision for ensuring that "reasonable accommodation" is provided to persons with disabilities in the workplace, thus making it important to apprehend the other countries' progress toward the signature and ratification.

Under those circumstances, the goal of this study was to evaluate the current situation of the progress made by the EU countries and the United States for improving the conditions of reasonable accommodations and to enumerate current concerns, for the betterment of their work conditions.

## ◆ Method of research

### (1) Setup and management of a research committee

A research committee was set up, consisting of outside experts on employment policies for persons with disabilities and on legal systems in EU countries and the United States. The committee was named "Research Committee concerning the Arrangement of Legal Systems on Employment and Measures to Promote the Employment of Persons with Disabilities in EU Countries and Other Regions" (chaired by Masaya Asahi, Professor at Saitama Prefectural University, and with the coauthors serving as committee members). From June to December 2007, four meetings were held to collect related information and the concerns to be addressed were cited.

### (2) Collecting, analyzing and translating documents and materials

- Regarding the trends in measures taken for persons with disabilities in the EU and its member states, the coauthors collected related information and documents based on the concerns raised in the committee meetings., and also collected documents published by the EU, ILO, United Nations and other organizations. Regarding the non-Discrimination acts against disability, Laws for Employment Promotion of Persons with Disabilities, and trends in "reasonable accommodation," the coauthors collected documents and materials concerning the recent status of those laws enacted and revised, and the employment status of persons with disabilities in Germany, France, the United Kingdom and the United States. The coauthors also had such documents translated if necessary.
- The coauthors studied the process leading to the final draft of the UN Convention on the Rights of Persons with Disabilities, as well as the responses made by the countries after its adoption.

## ◆ Research period

Fiscal 2007

## ◆ Contents of the survey

### (1) Research issues and the principles of summarization

In this study, the coauthors collected information for consideration in monitoring the present status and challenges, along with trends in the major EU member states (Germany, France and the United Kingdom), the United States (which has made advanced efforts regarding non-discrimination acts against disability and the reasonable accommodation), and the United Nations (which adopted the Convention on the Rights of Persons with Disabilities) from the two standpoints of non-discrimination against disability and the provision of reasonable accommodation in connection with the employment of persons with disabilities. In other words, the coauthors investigated non-discrimination laws and the provision of reasonable accommodation in connection with the employment of persons with disabilities in these regions and states, focusing on major EU countries and the United States.

The Research Committee decided to discuss the following points and to clarify the present situation and challenges faced by different regions and states.

- 1) The significance and nature of reasonable accommodation provisions in the EU's "Council Directive

establishing a general framework for equal treatment in employment and occupation"

- 2) The status and characteristics of accommodating the provisions of reasonable accommodation into domestic laws in EU member states
- 3) The significance and nature of reasonable accommodation in the UN Convention on the Rights of Persons with Disabilities
- 4) The current status and challenges in connection with non-discrimination laws and reasonable accommodation in the United States
- 5) The current status and challenges in connection with non-discrimination laws and reasonable accommodation in the major EU countries
- 6) Relation between non-discrimination and reasonable accommodation
- 7) The current status and challenges in connection with the conflict-solving system surrounding reasonable accommodation
- 8) Relation between the employment quota system and reasonable accommodation

Based on the discussions held at the Research Committee, and by utilizing the members' specialized fields, the task was divided among the coauthors, who wrote their portion of the report and edited.

## (2) Overview of the research findings

### (A) Trends in reasonable accommodation in the EU

- The idea of Reasonable accommodation was introduced in the legal systems of the United States, Australia, Canada and other nations in the 1990s. This concept had already been introduced in three EU states (Ireland, the United Kingdom and Sweden) prior to the EU directive. In the 2000s, reasonable accommodation was stipulated in the EU Directive ("Council Directive on establishing a general framework for equal treatment in employment and occupation," adopted in November 2000) and the United Nations Convention on the Rights of Persons with Disabilities (adopted in December 2006). The idea of reasonable accommodation has now entered into the international mainstream. The EU Directive obliges the 27 EU member countries to incorporate reasonable accommodation into their domestic laws and regulations. Such efforts are now steadily taking place.
- Reasonable accommodation embodies the viewpoint of a civil rights model, which clearly differs from the conventional welfare model in the sense that it allows persons with disabilities to exercise their rights as the basic principle. Any qualified person with disabilities, able to fulfill their particular professional duties if accommodations were made, can claim the rights for reasonable accommodation and the employer must provide effective accommodation in order to provide access to employment, continuation of work, training, promotion, etc., provided that such measures do not impose an excessive burden. This idea is different from the employment quota system, where those who exercise their rights are not always the persons with disabilities; the quota system obliges the employers to pay sanction if they do not meet the quota, and does not always lead to the rights to work of individuals with disabilities being affected by the economic and political situation of the time.

- As the result of the debates in the 1990s, the EU came to a conclusion that conventional rights guaranteed in social welfare laws did not conflict with the new rights given in equal treatment laws, and that would, in fact, complement each other. Based on this model that emphasizes and respects both types of laws, "Council Directive on establishing a general framework for equal treatment in employment and occupation" was adopted. However, in terms of providing accommodations, individual response is needed for each situation, since it differs considerably case by case.

- There is a debate in the EU over the issue of who has the access to reasonable accommodation, whether it is limited to the persons with disabilities themselves or if it is extended to their families, care providers and support providers in terms of protecting against discrimination and guaranteeing reasonable accommodation. The Council Directive stipulates in article 5 that "reasonable accommodation" should be guaranteed to "persons with disabilities". However, the directive as a whole advocates discrimination and the implementation of an equal opportunity law policy based on "disabilities" and does not define what "disabilities" are.

- Whether a denial of provide reasonable accommodation is regarded as discrimination against disabilities is not clearly mentioned in the "Council Directive on establishing a general framework for equal treatment in employment and occupation." There are now many different views and responses among the EU member states.

- Reasonable accommodation stipulated in the Directive 2000/78/EC targets only the field of employment and occupation, and therefore the narrowness of its scope should be addressed.

- When considering reasonable accommodation, the following views are important:

- (1) What is reasonable accommodation?

- (2) Is reasonable accommodation positive action?

- (3) For reasonable accommodation, is it enough to fulfill passive obligations?

- (4) Obligations of the people entitled to reasonable accommodation and the employer

- (5) Optimum process for clarifying the need for reasonable accommodation of individuals

- (6) Limitations on reasonable accommodation

- (7) Roles of public sector as employers and providers of reasonable accommodation

- (8) Relation between the obligation to provide accommodation and the elimination of discrimination

- The degree and method of transposing the idea of reasonable accommodation into national law is diverse and multi-layered. (1) Some member states do not mention about reasonable accommodation when transposing the Directive into their national laws., (2) diversity is also seen in employment and the use of such terms as "discrimination" and "reasonable accommodation." Moreover, (3) considerable differences are seen in the scope of who the applicants for reasonable accommodation are among the member states; (4)the provisions for preventing reasonable accommodation from becoming "disproportionate" are expressed in various ways, though the criteria for the judgement of being disproportionate vary. Additionally, (5) the relation between the denial of reasonable accommodation and discrimination is unclear in the domestic laws, and the criteria for discrimination also vary. (6)Regarding the distinction between reasonable accommodation and positive action, some member states clearly distinguish those two,

while others are more ambiguous in making a distinction, and some indicate some linkage between the two. (7) As for setting the process for reasonable accommodation, the recognition of the obligation is passive in some member states, while others indicate some principles, and yet others tries to clarify the process in the form of a legal precedent. Last but not least, (8) various provisions are also seen for public sector as employers and providers of reasonable accommodation and public subsidies.

(B) The UN Convention on the Rights of Persons with Disabilities and reasonable accommodation

- Unlike the EU Directive 2000/78, reasonable accommodation is defined in the Convention as part of the concept of non-discrimination. It means "necessary and appropriate modification and adjustments" for persons with disabilities, "where needed in a particular case" considering their specific needs, not imposing "a disproportionate or undue burden" on the provider. In short, reasonable accommodation can be defined as "coordination necessary in specific cases without imposing an excessively heavy burden." Given these basic characteristics, reasonable accommodation is not under any circumstances a program provision like positive action, which has a general, group-like nature. It is true that there are "universality" and "flexibility" in the definitions of the Convention. What significance those concepts come to have in specific scenes will have to wait until the interpretations of related bodies of the member states and the convention party (Committee on the Rights of Persons with Disabilities).

- The second difference between the UN Convention and the EU Directive is the scope of application of reasonable accommodation. The Convention covers "all human rights and fundamental freedoms" (Article 2), including civil, political, economic, social and cultural rights. The wide-range definition of reasonable accommodation under this convention is expected to have a great legal influence on the future signatories.

- The third difference is that the Convention is devoid of not only a definition of "indirect discrimination" but also any mention of the term itself. The EU Directive defines "indirect discrimination" and, cites reasonable accommodation as one of the exceptions that can be tolerated.

The discrimination against disabilities set forth in the UN Convention can be interpreted as to include "indirect discrimination," but even so, one cannot say that its specific meaning has been sufficiently elucidated.

(C) Trends and development in reasonable accommodation in several countries

- As for the impact of the Americans with Disabilities Act (ADA) and the political efforts that has been made, the opportunities of receiving reasonable accommodation after employment has increased. This trend can also be true for the workers who have become disabled in the middle of their life. The second major result is that reasonable accommodation is being promoted, as reflected in the growing number of companies that provide reasonable accommodation. The third result shows that reasonable accommodation being efficiently provided enables the persons with a more severe disabilities to work. The fourth result is that the cost performance has increased due to the reasonable accommodation. The fifth result is that the percentage of persons discriminated against in employment is on the decline.

- One challenge to be addressed in the United States is the courts' narrow interpretation of "an impairment that substantially limits one or more major life activities" contrary to its original purpose, thereby narrowing down the scope of persons with disabilities to be protected under the ADA. The United States Congress is now deliberating the ADA revision draft 2007 in order to correct such trends and revise its intentions as expressed in the early days after ADA was enacted.
- In the United Kingdom, the Disability Discrimination Act (DDA) of 1995 stipulates reasonable accommodation (reasonable adjustments).
- Reasonable adjustments cannot be provided if the employer did not know that an employee or an applicant for a job was a person with disabilities. This is because the obligation of reasonable adjustments is only exercised for particular persons with disabilities.
- Various matters are considered in determining whether it is reasonable for an employer to have to take a particular step. The effectiveness and practicability of particular adjustments are considered first, followed by the economic aspects (e.g., expenses, resources involved in the adjustments). One characteristic of the DDA is that it allows the possibility for employers of not making an adjustment due to their economic condition.
- If fund or personnels are subsidized by public programs and services, adjustments will become more reasonable as they alleviate the employers' cost burden. If a person with disabilities believes that he/she have been discriminated at work, including failure to make a reasonable adjustment, the person must first discuss the matter with his/her employer. If this fails to resolve or settle the matter, both parties can use the grievance procedure at workplace or the settlement or arbitration provided by ACAS, or make a claim to the tribunal. Under the DDA, employers were able to show that their failure to comply with the duty of reasonable accommodation was justified, but this provision on the burden of proof was shifted in the revised DDA of 2003. The DDA clearly stipulates that not to make "reasonable adjustments" is a form of discrimination. Moreover, before deciding whether treatment unfavorable to an employee is direct discrimination, whether the employer has fulfilled its necessary obligation of "reasonable adjustments" must be examined. The DDA also does not prohibit indirect discrimination, but because it was assumed that employers can be forced to make reasonable adjustments, the issue of indirect discrimination is addressed. These things lead to the conclusion that "reasonable adjustments" in the United Kingdom represent an important concept in the thinking about disability discrimination.
- Regarding the employment of persons with disabilities in Germany, Book 9 of the Social Code (Sozialgesetzbuch), which is entitled as "Rehabilitation and Participation of Persons with Disabilities", prohibited unfavorable treatment (Article 81-2) in 2001, even before enactment of the General Equal Treatment Law, and stipulates the rights of persons with disabilities concerning what is called reasonable accommodation (Article 81-3 and 81-4).
- Book 9 of the Social Code obligates employers to take "appropriate measures to make it possible to continue finding jobs suited for persons with disabilities" and also gives persons with disabilities the right to seek positions where they can sufficiently utilize their abilities and knowledge, care for vocational training measures within the corporation, disability-friendly positions, a defined scope of work, better



working conditions, the necessary technical assistance for work and other benefits. Should such demand inhibit any provision of labor protection or become an excessive burden on the employer, however, its implementation is not obligated. Moreover, persons with disabilities already at work may claim such appropriate measures, but the law is not interpreted as even providing the obligation for an employer to grant a particular position in accordance thereof.

- In fulfilling the obligations of employers concerning the employment of persons with disabilities, the Integration Bureau (Integrationsamt) and the Federal Employment Organization grant subsidies and benefits to employers. Moreover, as an establishment to restore rights under the General Equal Treatment Law, the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle) in the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth provides consultation, mediation and other services.

- It remains to be seen how the establishment of such provisions prohibiting unfavorable treatment in Germany, which has long had an employment quota system for persons with disabilities, will affect the actual rights and employment status of persons with disabilities in employment, and how they relate to German legal system for labor protection.

- In France, the EU Directive 2000/78 (Council Directive establishing a general framework for equal treatment in employment and occupation) on November 27, 2000, was implemented in domestic law in the form of Law No. 2005-102 for the equality of the rights and opportunities, participation and citizenship of persons with disabilities (loi 2005-102 pour l'égalité des droits et des chances, la participation et la cotoyenneté des personnes handicapées) on February 11, 2005. Based on this law, legislation and organizations concerning reasonable accommodation are being put into practice.

- The French measures to promote employment of persons with disabilities are double-sided, and consist of (1) the employment obligation to employ specified percentage of persons with disabilities (employment quota system), and (2) improvement of law concerning employment and work conditions for those people. Reasonable accommodation falls in the latter and is considered to be indispensable for ensuring the principle of equal treatment of persons with disabilities. The government tries to promote the employment of persons with disabilities and improve their work conditions through these two approaches.

- The employer's "obligation to exercise reasonable accommodation" can be interpreted as an extension and development of the employer's "obligation to provide readaptation" (obligation to maintain at work) that has existed for some time. It is clearly stated in the labor law that employer's refusal to provide reasonable accommodation would be regarded as a discriminatory treatment.

- Reasonable accommodation to be exercised by the employer is closely related to the public assistance and subsidiary. France has various forms of labor contracts which entail various financial aids, and financial assistance provided by such institutions as AGEFIPH (Association de gestion du fonds pour l'insertion professionnelle des personnes handicapées).

- In order to enforce measures on reasonable accommodation, it is also important to arrange a conflict-resolving system. In France, sanctions are provided through civil and criminal laws, and lawsuits can be filed not only by persons with disabilities

ed person him-/herself but by other people as well so as to alleviate the burden on legal proceedings. At

the same time, an independent statutory authority called " Haute autorité de lutte contre les discriminations et pour l'égalité" (HALDE) is established to enable a speedy, simple and less costly rescue system which is actually being used by an increasing number of people.

- At the same time, integrating and maintaining persons with disabilities at work, including reasonable accommodation, should be discussed at the regular collective bargaining and is considered to be important also at the labor-management level.

#### (D) Quota system and reasonable accommodation

- The relation between "quota system" and "reasonable accommodation" will be an important issue to be considered toward the ratification of the Convention on the Rights of Persons with Disabilities. While "reasonable accommodation" is a measure that should be provided to individuals on a case-by-case basis, employment quota is an institutionalized measure for promoting the employment of persons with disabilities as a whole.

- The program for payments for employing persons with disabilities related to the employment quota system and subsidies for operators employing persons with disabilities, however, are considered part of "reasonable accommodation" closely linked with the employment quota as a collective response. Subsidies for reasonable accommodation do not dilute the "reasonability" for reasonable accommodation, but are instead considered something that ensures and widely promotes "reasonability."

- Reasonable accommodation provided by employers is supported by various forms of financial assistance given through labor contracts and institutions such as AGEFIPH in France. In Japan as well, there is a levy and grant system based on the quota system. Although the quota system and reasonable accommodation may be considered to be a conflicting idea, in practice, those two are closely linked, as the financial resources are provided by the levy paid by the employers who do not meet the obligation.

#### (E) Mechanism for resolving conflicts over reasonable accommodation

- To ensure that "reasonable accommodation" is fully provided, it is essential to arrange a conflict-resolving mechanism. It is still to be considered what constitutes reasonable accommodation at workplace. However, it will certainly be difficult to put the idea into practice, if there were no concrete mechanism against conflicts.

- There are two aspects that are notable in the system of the United States. Firstly guidelines are presented and employers are urged to meet their obligations to exercise reasonable accommodation (prevention of conflicts), and secondly, court proceedings are implemented on condition that the arbitration procedure be directed toward a specific, concrete resolution of conflict (a system for resolving conflicts). As in the United States, the United Kingdom also has a conflict-resolving system that combines the two.

- In Germany, Book 9 of the Social Code stipulates the employer's obligations to provide reasonable accommodation, but these obligations are within the framework of the employment quota system and considered to have a weak nature as pertaining to the right to claim. Conversely, the obligation to take appropriate measures under the General Equal Treatment Law must wait for specific cases to be

accumulated in the future with regard to its scope. This obligation is philosophically linked with the provisions prohibiting unfavorable treatment, involves a larger range of eligible persons, and has such differences as proving the transfer of liability, all of which raise hopes for future developments.

- In France, provisions for applying civil and criminal sanctions for the violation on reasonable accommodation was made, and the rights to file lawsuits were expanded to people other than the person concerned in order to alleviate the burden of legal proceedings. At the same time, an administrative rescue establishment called "Haute autorité de lutte contre les discriminations et pour l'égalité" (HALDE) has been set up to arrange a speedy, simple and less costly rescue system that is now actually being used. With regard to the specific content of reasonable accommodation, examples of exercising this right are being accumulated and an upward trend is seen in the number of claims filed at the "Haute autorité de lutte contre les discriminations et pour l'égalité" (HALDE). These efforts are steadily going forward.

- Moreover, consultation at the labor-management level should occur on occupational participation and maintaining the employment of persons with disabilities, as well as reasonable accommodation, and should be discussed at the table of collective bargaining.

## ◆Future challenges

- In Japan, there is no statutory law that clearly defines and prohibits the "denial of reasonable accommodation" as a form of disability discrimination. Through our study, it has been confirmed that more discussion has to take place to ensure reasonable accommodation to the people concerned in the process towards the ratification of the Convention on the Rights of Persons with Disabilities. The practical approach towards reasonable accommodation in the EU countries, especially those countries that have adopted the quota system like Japan, will presumably have an important suggestive impact on future discussion over how "anti-discriminatory approach" can be compatible with the "employment quota approach."

- Reasonable accommodations are presently provided in Japan in the framework of education and welfare, and should be also promoted through the equal employment opportunities policies. How these different area can be coordinated would also be the problem to be solved.

- Under the Convention on the Rights of Persons with Disabilities, each member state has the discretion to decide the scope of reasonable accommodation. Our future task will be to study and compare how the idea is put into practice in each member state. Since the idea of reasonable accommodation is closely linked to the employment of persons with disabilities in the employment policies, considering the core idea of reasonable accommodation in the fields of employment and occupations is important when thinking of how the idea should put into practice in the measures for equal employment opportunities under the non-discrimination law.

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